New-Stan Dyeing and Finishing Co., Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC and Local 239A, United Textile Workers of America, AFL-CIO, Party to the Contract

Local 239A, United Textile Workers of America, AFL-CIO *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC and New-Stan Dyeing and Finishing Co., Inc., Party to the Contract. Cases 2-CA-17506 and 2-CB-8566

September 15, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On March 12, 1982, Administrative Law Judge Thomas T. Trunkes issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, Respondent Employer filed exceptions and a supporting brief, as well as a brief in support of part of the Administrative Law Judge's Decision, and Respondent Union filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, New-Stan Dyeing and Finishing Co., Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Discouraging membership on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization, by discharging or otherwise discriminating against employees in any manner with respect to their hire or tenure of employment, or any term or condition of employment."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any references to the discharges of Jack Mulligan and James Lewis, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against either of them.

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that that portion of the complaint dealing with the 8(a)(2) allegation in Case 2-CA-17506 and the complaint in Case 2-CB-8566 be, and they hereby are, dismissed in their entirety.

[1] Both Respondent Employer and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We disavow the Administrative Law Judge's statement in the "Analysis and Discussion" portion of his Decision that "in the business world, it is common practice that in a shutdown of a plant, employers tend to wait as long as possible before notifying employees or their representatives of their plans. This is so because the employer desires to have its employees working for it until the last possible moment of operations. Otherwise, should an employer inform its employees of a proposed shutdown in some distant future time, employees would 'leave the sinking ship' and obtain employment elsewhere, thus leaving the employer with production and wrap-up work to be done without any help." We agree with his earlier statement that "the record is bereft of any hard evidence to reveal the true purpose that the principals of New-Stan had in dealing with representatives of the Charging Party . . . ."

We agree with the Administrative Law Judge's conclusion that the same jobs exist under the same working conditions at New-Stan Dyeing and Finishing Co. as existed at Newburgh Dyeing Company. We do not agree, however, that neither the General Counsel nor the Charging Party came forth with any evidence to negate this conclusion. We find that the record clearly indicates that essentially the same jobs exist at New-Stan as existed at Newburgh under the same working conditions.

In the "Background" section of his Decision, the Administrative Law Judge incorrectly stated that the most recent collective-bargaining agreement between the Charging Party and Standard Dyeing and Finishing Company became effective October 16, 1979, rather than 1 year earlier. We hereby correct this inadvertent error.

The Administrative Law Judge recommended that the Board assert jurisdiction over Respondent Employer based on a projection indicating that Respondent Employer would annually sell and ship goods and materials valued in excess of $50,000 from its place of business in New York directly to enterprises located outside the State of New York. He further stated, in fn. 2 of his Decision, that "[T]he record does not reflect whether or not [New-Stan] met the Board's commerce criteria for nonretail enterprises." We find, however, that Respondent met the Board's commerce criteria on the basis of the above projection. See *Carpenter Baking Company, Inc.*, 112 NLRB 288, fn. 1 (1955).

[2] We shall modify the Administrative Law Judge's recommended Order so as to require Respondent Employer to expunge from its files any references to the discharges of Mulligan and Lewis, and to notify them in writing that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Member Jenkins would compute interest on the backpay of the dischargees in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

263 NLRB No. 140

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate or engage in surveillance of our employees who engage in protected concerted or union activities.

WE WILL NOT discourage membership in Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jack Mulligan and James Lewis immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make Jack Mulligan and James Lewis whole for any loss of pay suffered by them by reason of their discriminatory terminations, with interest.

WE WILL expunge from our files any references to the discharges of Jack Mulligan and James Lewis, and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against either of them.

NEW-STAN DYEING AND FINISHING CO., INC.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge: The above proceeding was heard in New York, New York, on June 8, 9, and 10 and July 9 and 10, 1981, upon charges filed by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called ACTWU or the Charging Party, on September 2, 1980, and a complaint and notice of hearing issued thereon on October 17, 1980, pursuant to Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, which alleges that New-Stan Dyeing and Finishing Co., Inc., herein called New-Stan or Respondent Employer, violated Section 8(a)(1), (2), and (3) of the Act. Thereafter, on October 23, 1980, ACTWU filed a charge against Local 239A, United Textile Workers of America, AFL-CIO, herein called Local 239A or Respondent Union, and a complaint and notice of hearing issued thereon on December 2, 1980, pursuant to Section 10(b) of the Act, alleging that Local 239A violated Section 8(b)(1)(A) and (2) of the Act. Thereafter, on January 23, 1981, the two complaints were consolidated for hearing.

All parties were represented, and participated, at the hearing, and had full opportunity to adduce evidence, examine and cross-examine witnesses, file briefs, and argue orally. All parties waived oral argument and filed briefs. The issues presented in this case are the following:

1. Whether New-Stan violated Section 8(a)(1) and (2) of the Act by granting recognition to, and entering into and enforcing a collective-bargaining agreement containing a union-security clause with, Local 239A prior to hiring any employees?

2. Whether New-Stan violated Section 8(a)(1) of the Act by surveillance and/or interrogation of its employees with respect to their union membership, activities, and sympathies?

3. Whether New-Stan violated Section 8(a)(1) and (3) of the Act by discharging its employees Jack Mulligan and/or James Lewis because said employees joined, supported, and assisted ACTWU, and refrained from supporting or assisting Local 239A?

4. Whether Local 239A violated Section 8(b)(1)(A) and (2) of the Act by accepting and obtaining recognition from, and entering into and enforcing a collective-bargaining agreement containing a union-security clause with, New-Stan prior to the hiring of any employees by New-Stan?

Upon the entire record in this case,[1] including my observation of the witnesses and their demeanor, and after due consideration of the briefs filed by all the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

New-Stan, a New York corporation, with an office and place of business located in Newburgh, New York, is engaged in the business of dyeing various types of fabrics and materials. The complaint alleges that based on a projection of its business operations since on or about June 23, 1980, at which time New-Stan commenced production, New-Stan, in the course and conduct of its business operations, will annually sell and ship from its Newburgh place of business goods and materials valued in excess of $50,000 directly to other enterprises located outside the State of New York. New-Stan and Local 239A both admit, and I find, that New-Stan is an em-

[1] Motion of Local 239A to correct the transcript, dated October 23, 1981, is hereby granted.

ployer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE LABOR ORGANIZATIONS

New-Stan and Local 239A admit, and I find, that both ACTWU and Local 239A are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Newburgh Dyeing Corp., herein called NDC, for many years had been engaged in the business of dyeing fabrics and materials similar to that of New-Stan. The president and 100 percent owner of the stock of NDC was Fred Massimi, Sr. However, during the last 2 years of operations of NDC, the business was, in practice, operated by Massimi's two sons, Fred Jr. and Greg, although neither of the sons owns any part of the business. Greg, a witness for New-Stan, and presently secretary of New-Stan, held the position of vice president of NDC.[3] For many years NDC had been engaged in a contractual relationship with Local 239A, the last contract expiring on June 9, 1980. Approximately April 1, 1980, George Haskins, an employee of NDC and president of Local 239A, was informed by Greg that NDC was closing down and that employees would be laid off. According to Haskins, Greg stated that NDC was being sold to an outfit in Paterson, New Jersey.[4] Greg further informed him that the new company would take "our contract as is along with our people." Greg testified that he instructed all employees to "keep in touch," as the plant would be reopened in approximately a month and the employees would be recalled to work. At the time of the shutdown of NDC, there were approximately 60 employees on the payroll. Although not in operation, NDC currently exists as a corporate entity.

Rocco Barone, an officer of New-Stan, was employed by Standard Dyeing and Finishing Corporation, herein called Standard, from 1962 until its closing in 1980. Barone testified that Adolph Nazzaro, Sr., owned approximately 42 percent of the stock in Standard; David Lavorgna—10 percent; Morris Wax—21/ percent; Bill Carafiello—10 percent; Richard Knight—10 percent; Adolph Nazzaro, Jr., and Joseph Nazzaro—approximately 7 percent each, and he, Barone—10 percent. Adolph Nazzaro, Sr., was president of Standard, Wax was treasurer, and Lavorgna was secretary. The remainder of the owners were vice presidents, one of whom was also assistant treasurer. According to Barone, Standard first considered closing down its plant in Paterson, New Jersey, at the end of 1979 because the building lease was due to expire in December 1980, and Standard was notified that it would be assessed moneys for use of sewers its last year. In addition, Standard was informed that a 50-percent increase in rent in the next lease would be requested. Thus, the majority of stockholders reached the conclusion in 1979 that Standard had to close sometime before the expiration of the lease in December 1980. Approximately in April 1980, Standard reached the decision to close its plant. Standard discontinued its operations about the middle of June and began a phaseout. It closed out its plant in the latter part of August 1980, at which time the last of the employees were terminated. Barone asserted that he is still a vice president and stockholder of Standard. All of the other officers of Standard hold the same positions as when it was in operation.

Joseph LaBarck testified that he has been president of Dyer's Local 1733, ACTWU, since April 1, 1980. Prior to that, he had been a business agent for 2 years and continued at that role when he assumed the role of president of his local. He was also a member of the executive board of his local from 1974 to 1978 and held a position as shop steward. His duties as president are to supervise all other officers and to carry out wishes of the membership and the executive board. He sees that contracts are honored and assists members in all ways. He also assists employers covered by collective-bargaining agreements with ACTWU. He was the representative of his union which had several collective-bargaining agreements with Standard, the most recent contract effective from October 16, 1979, until October 1, 1980. In March 1980,[5] members of his local informed him that Standard was "in trouble," which prompted conversations with various owners of Standard, including Adolph Nazzaro, Sr., herein called Nazzaro, and Bill Carafiello, herein referred to as Bill. He was informed that he would be the first to know if there would be a shutdown of the plant. Standard informed him that it had problems and was uncertain whether or not Standard could remain in business. On May 5, another meeting was held at the office of Standard between representatives of ACTWU and officials of Standard. At that meeting LaBarck was informed by Nazzaro that Standard was moving to another location in New York, specifically into a plant that went bankrupt in Newburgh. LaBarck responded that this was no problem as his local would follow Standard to Newburgh. According to LaBarck, Bill asserted that another union represented employees at Newburgh which had a different contract, and asked LaBarck if he could help them out as he preferred having ACTWU represent the employees. LaBarck answered that Standard would have to notify his union by letter. He asked Nazzaro if he was selling the company and leaving his customers in Paterson, to which Nazzaro replied that he needed customers, as without customers he could not stay in business. He added that he would be going to Newburgh as a consultant, and his two sons and other individuals at Standard would be part of the Newburgh company. LaBarck asked Nazzaro if he were going to sell whatever Standard had in Paterson and asked if he were buying another company elsewhere. Nazzaro responded negatively, stat-

[2] By the end of the hearing, New-Stan had completed 1 year of operations. The record does not reflect whether or not it met the Board's commerce criteria for nonretail enterprises. In the absence of contrary evidence, I recommend that the Board assert jurisdiction on the basis that the projection was obtained.

[3] The record does not indicate what position, if any, was held by Fred Jr. at NDC.

[4] The name of the purchaser was not mentioned.

[5] Unless specified otherwise, all subsequent events occurred in the year 1980.

ing that Standard was moving from Paterson to Newburgh. LaBarck further asserted that Bill visited his local and asked if employees were willing to travel to Newburgh, to which LaBarck replied affirmatively, stating that he had a meeting with employees and that at least 90 employees were willing to relocate to Newburgh.

On May 5, another meeting was held in the office of Standard's attorney. Bill stated that he would like to have LaBarck's local represent the people in Newburgh, but there were certain concessions he wanted as another local in Newburgh was offering lower wages and the workload was different. LaBarck stated that there was no pension and he could not forego that. Further, the Union in Newburgh had different dental, optical, welfare, and hospitalization plans. When Bill stated that the wages would be approximately $3 an hour, LaBarck responded that he could not accept that because employees do not need a union to represent them for six holidays and a substandard hospitalization plan. Thereafter, approximately on May 8, LaBarck received a letter from Standard, notifying him that Standard would be shut down in approximately 60 days.

LaBarck further testified that at a meeting held on May 19 between representatives of Standard and his Union, the ACTWU suggested hiring be done from both the Newburgh and the Paterson plants and employees be allowed to choose which union they wanted, hiring to be done on a seniority basis. Barone replied that he did not believe that people would travel 50 miles to go to work. LaBarck handed him a list of employees, approximately 80 to 90, who indicated that they were prepared to travel to Newburgh for a new job.[6] One of Standard's representatives suggested that it could obtain employees from the Newburgh local. LaBarck insisted that he had a contract with Standard, and, as Standard was moving, his local should represent the employees. Barone replied that Standard would be phasing out, it would be starting out with about 50 employees in Newburgh, and that application for employment would be furnished. No discussion was had with respect to any decision as to which individuals would be hired at the new plant to be known as New-Stan, the Respondent Employer in this matter.

Another meeting was held on May 29 between representatives of Standard and the Charging Party. After some discussion, an agreement was reached that Barone would have applications ready for employees of Standard for employment at Newburgh. At this meeting, Standard's attorney stated that no contract had been signed with Local 239A to cover the employees at the Newburgh facility. A day or two later, another meeting was held at the office of the Charging Party. Representing Standard or New-Stan[7] was Bill. The Charging Party offered to help Bill to "get the new company going." Bill responded that Local 239A had a contract. According to LaBarck, Bill further asked for a minimum wage and other below-standard conditions to which the Charging Party members, according to LaBarck, would never agree. Bill stated that, if the Charging Party would meet certain conditions, it would be the Union representing the employees at the Newburgh facility, which he would prefer to have. LaBarck rejected that offer and Bill stated that he would get back to the Charging Party. A further meeting was held on June 6 at the Charging Party's office. A strike was in progress between June 2 and 10 at Standard at this time. LaBarck told Standard representatives that its employees should go to Newburgh as Standard had a contract with the Charging Party. He further commented that commitments for the hiring of employees were not being met, and that they should have applications for employment. Standard's attorneys stated that there was no preference of any union at this time and suggested that the strike be called off and employees return to work. LaBarck responded that, when certain conditions were resolved, the employees would return. Barone asserted that no decision had been made as to which employees would be hired at Newburgh. He stated that the employees of Standard had to finish their work in Paterson and that applications would be furnished to them and they would be hired after the applications were processed. Another meeting was held on June 9 at Standard's office. Standard agreed to make certain concessions to the Charging Party and Bill stated that employees of Standard could make applications for employment at New-Stan. Barone stated the applications would be ready and the employees could go to Newburgh. LaBarck requested that applications be handed out to the employees of Standard at that time rather than have them travel to Newburgh, but Standard refused this request, asserting that applications would have to be made in Newburgh to which LaBarck finally agreed. Standard stated that as soon as it phased out the Paterson operation, it would move to Newburgh and LaBarck would be contacted. No discussion was had with respect to which employees had already been hired by New-Stan. Barone, Bill, and Nazzaro, according to LaBarck, all stated that employees of Standard and NDC would fill out applications and would be chosen on that basis. At the end of June, LaBarck received a telephone call from Barone stating that, on July 2, 3, and 5, New-Stan would be accepting applications for employment. LaBarck requested that Barone leave applications with him as it was vacation time and most of Standard's employees were on vacation. However, Barone rejected this suggestion again, asserting that the employees of Standard would have to go to Newburgh to seek employment for New-Stan. LaBarck asked Barone if there were a union at Newburgh representing the employees, reminding Barone that he had a contract with the Charging Party. Barone responded that there was no union, and that the employees of Standard should make applications for employment for New-Stan.

Meanwhile, while representatives of New-Stan were negotiating with LaBarck who represented the Charging Party, they also were negotiating with representatives of Local 239A. John Harderman of Local 239A, area director for New Jersey and New York, testified that he received a telephone call from Fred Massimi, Sr., asking to meet with him in New Jersey in a diner about March 28

[6] Paterson, New Jersey, is approximately 44 miles from Newburgh, New York.

[7] The record is not clear as to which company, Standard or New-Stan, was being represented by Bill or Barone in their discussions with the Charging Party during these meetings in May and June.

or 29. Accompanied by two other union representatives, Harderman met with Fred Sr., Barone, and Bill. He had never met Barone or Bill previously, but was introduced to them by Fred Sr. as potential buyers of the Newburgh plant. Harderman informed Barone and Bill that his Union had a contract with NDC. They responded that they were unaware of this, and that they would study the contract and see if they could meet the terms. No commitment was made at this meeting. No discussion was made as to which employees would be hired nor was there any mention of the name of the new company to be formed. Barone and Bill stated that they would get back to Local 239A through Fred Sr. Further discussions then were held between New-Stan and Local 239A which culminated in a memorandum of agreement, dated June 9, that New-Stan would recognize Local 239A as the representative of New-Stan's employees. According to Harderman, the agreement included hiring all the employees of NDC between the period of time when NDC closed and New-Stan opened, with the basic wages they had been receiving at the time NDC closed.

The undisputed evidence reveals that the owners of New-Stan with their percentage of stock ownership are as follows: Rocco Barone—12 percent; Gregory Massimi—12-1/2 percent; Adolph Nazzaro, Jr.—18-3/4 percent; William Carafiello—12-1/2 percent; Richard Knight—12-1/2 percent; Fred Massimi, Jr.—12-1/2 percent; and Joseph Nazzaro—18-3/4 percent. Of these seven individuals named, five were minority stockholders at Standard, and the other two, Fred Jr. and Greg Massimi, were the sons of the owner of NDC. Barone became president; Greg, treasurer; Adolph Nazzaro, Jr., secretary; and all others are vice presidents. According to Greg, he and his brother invested their own funds without help from their father. However, he does admit that loans were taken out with his father as a coguarantor.

The certificate of incorporation of New-Stan reveals that it was issued on May 20, 1980, under section 402 of the Business Corporation Law of the State of New York. The certificate states that the purpose for which New-Stan was formed is as follows:

> To carry on the business of designing, leaching, dyeing, printing and finishing, or preparing for use or sale by any other process, textile fabrics, yarns, threads, fibers and any or all other articles or materials; to manufacture, purchase, or otherwise acquire any goods, fabrics, or other materials, raw, wrought, or in process, to be bleached, dyed, printed, finished or subjected to any other process incident to the preparation of same, for use or sale, and to sell, deal in, and dispose of the same; and to do such general manufacturing, merchandise, warehouse, and commission business as it may desire in connection with its business.

Greg testified that he and Barone did the hiring of employees for New-Stan. He asserted that he attempted to follow the collective-bargaining agreement that Local 239A had with NDC in recalling employees to New-Stan. He stated that New-Stan employees formerly employed at NDC retained seniority calculated from their days at NDC. According to Greg, this seniority list is for callbacks when there is a layoff, the only purpose a seniority list is utilized. When time came for the commencement of production at New-Stan, on June 23, he personally attempted to contact every employee of NDC, even visiting the homes of those employees without telephones, to inform them that the plant was starting up production. None of the NDC employees was required to fill out new employment applications. Of the approximately 35 employees originally hired at the commencement of production, approximately 85 percent were former employees of NDC.[8] Greg testified that he was aware that Barone had assured employees of Standard that there would be applications of employment available for them. He considered employees of Standard before hiring NDC employees, but he never saw any said employees and Barone did not furnish him a list of employees who might be interested in working at New-Stan. Accordingly, unlike with the employees of NDC, none of these Standard employees was contacted by Greg for employment.

The uncontested facts revealed that New-Stan purchased, and commenced production in, the same buildings formerly occupied by NDC. In addition, New-Stan purchased all the machinery and equipment from NDC. However, New-Stan also purchased some machines and equipment from Standard, which were shipped to Newburgh from Paterson.[9]

In addition to calling the various unit employees from NDC, within a week after it began production, New-Stan hired four former supervisors of NDC. Approximately 3 weeks to 1 month after production commenced, it also hired two supervisors from Standard. Barone testified that the Standard supervisors were not hired immediately inasmuch as there was insufficient production for a second shift at New-Stan at the beginning of its operation.[10] Barone further testified that the NDC supervisors performed roughly the same tasks they had previously performed for NDC in the same departments.

B. *The Surveillance, Interrogation, and Discharge of Jack Mulligan*

LaBarck testified that, in the beginning of July, agents from the Charging Party journeyed to Newburgh for the purpose of obtaining union authorization cards from employees of New-Stan. Thereafter, on July 7, the Charging Party filed a petition seeking to represent a unit of all production and maintenance employees, including shipping and receiving employees of New-Stan. He became aware, through Tony Sedor, hereinafter called Tony, an assistant regional director of the Charging Party, that

[8] Haskins testified that all former employees of NDC, with the exception of three or four who had obtained employment elsewhere, were rehired by New-Stan.

[9] Testimony was received that, upon the shutdown of Standard, all its machinery and equipment were auctioned off to the highest bidder. Some of this equipment and machinery were purchased by New-Stan, while the remainder was purchased by other unidentified parties.

[10] The Standard supervisor had worked the second shift at Standard.

Local 239A had a contract with New-Stan.[11] LaBarck further testified that he first heard that New-Stan had a contract with Local 239A approximately in August at a hearing before the AFL-CIO. Haskins, on the other hand, stated that he first became aware of the Charging Party attempting to organize the employees of New-Stan in Newburgh when some of his members informed him of it several weeks after New-Stan began production.

Jack Mulligan, one of the alleged discriminatorily discharged employees, testified that he was employed by NDC from January to March 1980, working in the dye house and earning $3.25 an hour. He was not a member of any union while at NDC, although he heard that a union was representing employees. In June, he was informed by a former employee of NDC, that "a new company came in and hiring would be done." Thereafter, he was interviewed and hired by Fred Jr. to start the following Monday at $3.75 an hour. He began employment at New-Stan on Monday, June 30. The same day, Haskins approached him and another employee, Pete Kassel, while they were engaged at work at New-Stan, and requested that they sign union authorization cards for Local 239A. Kassel signed the card, but Mulligan did not.

The following day, Tuesday, July 1, at or about 4:30 p.m., Tony and Paul Ventura, a business agent for the Charging Party, herein called Paul, approached Mulligan and Kassel as they were leaving New-Stan after work. The two employees were asked to sign union authorization cards for the Charging Party. Mulligan consented to do so, and as he was bending on one knee to sign the card, Fred Jr., accompanied by two other employees of New-Stan, drove by in a car. The car stopped and Fred Jr. and one of the other two employees[12] emerged from the car. Fred Jr. approached the four individuals on the sidewalk and asked the union agents what they were doing with his employees. Tony responded that he was organizing the employees "to get a better union." Fred Jr. retorted that Tony did not have any right to do so, and directed the employees to see him in his office the next morning. After Fred Jr. left, Mulligan was asked to relate to the two union agents what Fred tells them, and it was agreed they would meet the next day at lunchtime outside the plant.

The next morning, July 2, the two employees reported as directed by Fred Jr. to his office. Seeing no one there, they reported to their work stations. Approximately 1 hour later, Greg visited them to inform them that their work was unsatisfactory. Later that morning, at approximately 11:50, the two employees visited Fred Jr.'s office again. Fred Jr. accused them of signing union authorization cards for the Charging Party. Kassel denied signing said card. Fred Jr. responded that it is illegal to sign two union authorization cards. Mulligan answered that he did nothing wrong, to which Fred Jr. asked, "You signed the white card, didn't you?"[13] Kassel admitted signing the card, but Mulligan denied doing same. Fred Jr. then called Haskins to join in the discussion. He asked Haskins where the white cards were that the two employees allegedly had signed. Mulligan interjected, stating that he did not sign a white card, but Kassel readily admitted having signed one. Fred Jr. then asked Haskins if it were true, as the employees had stated earlier to him, that he had told James Lewis, an employee recently discharged, that he had been fired for failing to sign the union authorization card for Local 239A. When Haskins denied having stated that, Kassel accused him of being a liar. Haskins stated, "I said he was laid off for passing out the blue union cards."[14] Thereupon, Fred Jr. and Haskins left the room and were heard by Mulligan speaking in a loud voice. Fred Jr. returned to the office and directed the two employees to go to lunch. As they left the plant, Mulligan observed Greg and Alfredo entering an automobile and heading in their direction. As they approached Tony and Paul who were waiting for them, they were waved on by Tony, and continued walking to a store. A few minutes later, as they returned toward the two union agents, the car containing Greg and Alfredo again passed them going back to the plant. When they arrived at the gate to the plant, the guard informed them that he had orders not to permit them to enter the plant. They thereupon sought the two charging party agents, but were unable to locate them.

The following day, Thursday, July 3, Mulligan returned to New-Stan to receive his paycheck. The guard at the gate stated he would call the office. He returned to inform Mulligan to return in a week.

Mulligan testified that, sometime during that week, Mulligan telephoned Greg, inquiring for his job back, stating that he had heard that Kassel had received his job back. Greg responded that work was slow and, when business picked up, he would be called. To this date, Mulligan has not been called back to work. He returned the following week and obtained his paycheck which was left at the gate for him.

Paul verified Mulligan's testimony with respect to the incidents that occurred outside New-Stan's facility on July 1 and 2.

Greg denied any surveilling of employees on July 2. He denied following any employees with a specific intent of surveilling them. Although he does recall having seen Mulligan in the company of several other people on the street on July 2, he alleged that he was accompanied by another individual, both of whom set out to obtain lunch from a fast food establishment and then return to the plant. He testified that he later was informed by his brother, Fred Jr., that Mulligan had been laid off along

[11] It should be noted that, in the petition filed by the Charging Party on July 7, it listed Local 239A as an organization which is known to have a representative interest in the unit sought by the Petitioner.

[12] Identified as Alfredo, last name unknown, but identified by Mulligan as the person in charge of the shipping and handling department.

[13] The white card referred to the card handed out by Haskins on Monday, June 30, under instructions by Harderman who testified that, under advice of counsel, he instructed representatives of Local 239A to have both the old employees formerly employed by NDC and any new employees hired by New-Stan sign union authorization cards for Local 239A. He testified that the purpose was to keep track of all the employees in the appropriate unit represented by Local 239A employed by New-Stan.

[14] The blue union cards were identified as the union authorization cards of the Charging Party.

with Kassel. He is aware that Kassel returned to work, but was unaware whether Mulligan had also returned. He testified that business was slow at the time and that New-Stan tended to lay off people a week at a time, and thus Mulligan and Kassel were laid off. He further testified that normally his brother or himself contacted employees when needed, but he did not contact Mulligan. He stated that his brother had informed him that he could not get in contact with Mulligan to return to work, and that it is common practice for employees to visit the plant when they are laid off, or otherwise contact the Company at least once a week for details on returning from layoff status. Greg further stated that he did not think Mulligan really wanted to come back to work because he never returned, rationalizing, "when you get laid off you usually check with your employer to find out when to come back to work, most people do."[15] Greg further testified that he had no idea, up to and including the date of the hearing, that an unfair labor practice charge had been filed against New-Stan alleging the discriminatory discharge of Mulligan.[16]

C. *Discharge of James Lewis*

James Lewis, herein referred to as Lewis, one of the alleged discriminatorily discharged employees, testified that he was employed by NDC, from September 1979 until April 1980 as a dye lots operator. He first became aware that NDC would be closing down in April 1980 when he read of it in a newspaper. He thereafter was informed by Tommy Turner, head dyer, on the date of the layoff that the plant would be closing for "a couple of months."

On June 25 he returned to work for New-Stan. Two days later, on Friday, June 27, as he was walking to his car in the company parking lot, he met Paul. He observed Bobby Turner, a supervisor of New-Stan, watching them. Paul asked him to sign a union authorization card for the Charging Party, and further requested him to obtain signed cards from fellow workers. The following Monday, June 30, at approximately 8 a.m., he handed authorization cards to two employees, stating that he would pick them up later after work.[17] On Tuesday, July 1, Lewis did not go to work. He absented himself for personal reasons and did not notify New-Stan of his inability to report to work that day, claiming, "I was in Connecticut so I couldn't very well call in from Connecticut." He further testified that, in prior absences from work, he had not notified NDC and was not disciplined for it. Upon his return to work at New-Stan on Wednesday, July 2, Bill inquired about his absence and failure to notify New-Stan. As he began to explain the situation, Bill interrupted and stated that he had made other arrangements for that day and sent Lewis home. When he inquired about work for the following day, Greg, who was standing nearby with Lewis and Bill, stated that he would get in touch with Lewis. Lewis thereupon left the plant. Lewis testified that he "kept calling the plant," inquiring when he could return to work. Eventually Bill notified him on the telephone that he had not been laid off but had been terminated. Lewis further testified that he was unaware of any plant rules concerning absenteeism, adding that he had never received any oral or written warnings concerning past absenteeisms.

Paul testified that on June 27, after Lewis showed interest in the Charging Party, he supplied him 20 to 30 union authorization cards, asking him to hand them out to his coworkers and return them to him the following week.

Haskins testified that he had no idea that Lewis had been laid off as Bill had informed him that Lewis had not shown up for work 1 day. He asserted that Lewis never came to see him, nor did he file a grievance or complain to him with respect to his termination or layoff. However, on cross-examination, he did admit receiving a letter from Lewis asking him to process a grievance on his behalf. Upon receiving Lewis' grievance, Haskins delivered it to another union representative. No further information was divulged as to what transpired subsequently.

No evidence was adduced from New-Stan with respect to the termination of Lewis.

D. *Analysis and Discussion*

1. The alleged 8(a)(2) and 8(b)(1)(A) violations

The General Counsel contends that New-Stan is not a successor to either NDC or Standard, but rather is a merger of the two companies. As an alternate theory, the General Counsel contends that New-Stan is a new entity altogether, and, thus, New-Stan and Local 239A violated the Act when New-Stan recognized and entered into a collective-bargaining agreement with Local 239A. The General Counsel suggests that an election under the *Mid-West Piping*[18] doctrine would be the proper remedy for the alleged violations.

The Charging Party is in accord with the General Counsel's contention, arguing that at some point in time recognition was granted by New-Stan to Local 239A, at a time when the Charging Party indicated that it desired to represent employees at the Newburgh facility.

New-Stan and Local 239A dispute the contentions of the General Counsel and the Charging Party. Their position is that New-Stan is a successor company to NDC, as evidenced by its purchasing of NDC's assets, land, buildings, and equipment. The General Counsel concedes that, should New-Stan be found to be a successor to NDC, the recognition by New-Stan accorded to Local 239A would have been proper.

For the reasons stated below, I have concluded that New-Stan is a successor of NDC, and thus was obligated to bargain with Local 239A as representative of an appropriate unit of employees at New-Stan's Newburgh plant. Accordingly, I recommend that that portion of the

[15] Greg did not specifically dispute or deny that Mulligan had telephoned him inquiring about his recall.

[16] Neither Fred Jr. nor anyone who may have been present with him, including Haskins, disputed the testimony of Mulligan or Paul relating to the events of July 1 and 2.

[17] The record does not indicate whether said cards were delivered to him later that day.

[18] *Mid-West Piping & Supply Co., Inc.*, 63 NLRB 1060 (1945).

complaint dealing with the 8(a)(2) allegation against New-Stan and the 8(b)(1)(A) allegation against Local 239A be dismissed.

It is well settled that a change in ownership of a business enterprise does not, of itself, relieve the new owner from an obligation to recognize and bargain with the union that represented the predecessor's employees. *N.L.R.B.* v. *The William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). As the Supreme Court stated in *Wiley*, "[T]he object of national labor policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to arrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. . . . [at 549]." The crucial test developed by the Board and sanctioned by the courts in determining whether the successor employer inherited the labor obligation of the predecessor is whether the employing industry remained the same after the transfer. *N.L.R.B.* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970). The Board further stated in *Lincoln Private Police, Inc. as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717, 719 (1971), "Where there is substantial continuity in the identity of the employing enterprise, the purchasing employer is bound to recognize and bargain with the incumbent union. In the many cases that have been before the Board on the successorship issue, it has not accorded controlling weight to any single factor, but has evaluated all the circumstances present in any given case in arriving at an ultimate conclusion."

The critical issue in the instant case is whether New-Stan is the successor to NDC and thus bound to recognize and bargain with the collective-bargaining representative of the employees of NDC, which in this case is Local 239A. If successorship is not found, then New-Stan is under no obligation to Local 239A, and accordingly, the General Counsel and the Charging Party would prevail in their contention that the two Respondents have violated the Act, as alleged in the complaint.

As New-Stan pointed out in its brief, the Board has offered guidelines for determining whether a successorship bargaining obligation attends the sale or transfer of a business. The factors are:

(1) Whether there has been a substantial continuity of the same business operations.

(2) Whether the new employees use the same plant.

(3) Whether it has the same or substantially the same work force.

(4) Whether the same jobs exist under the same working conditions.

(5) Whether it employs the same supervisors.

(6) Whether it uses the same machinery, equipment, and methods of production.

(7) Whether it manufactures the same product or offers the same services.[19]

[19] *Band-Age, Inc.*, 217 NLRB 449, 452–453 (1975); *J-P Mfg., Inc., successor to Traverse City Manufacturing, Inc.*, 194 NLRB 965, 968 (1972).

Thus, it is appropriate and proper to analyze the facts of the instant case to determine whether, and to what extent, they meet the criteria established by the Board.

a. *Substantial continuity of the same business operations*

It was stipulated by the parties during the hearing that New-Stan is engaged in the same business as its predecessor, NDC.[20] Basically, both have been engaged in the business of dyeing various types of fabrics and materials.

b. *Use of the same plant*

The undisputed evidence established that New-Stan occupies and uses the same plant occupied and utilized by NDC.

c. *The same or substantially same work force*

It is undisputed that 85 percent of New-Stan's work force were former employees of NDC. The evidence further established that upon the shutdown of NDC, and the layoff of its employees, the employees were informed by supervisors of NDC that the plant would be reopened in a short time and that these employees would be recalled. The undisputed testimony established that Greg, a former supervisor at NDC, and presently a principal of New-Stan, did in fact communicate with as many employees of NDC as he could to offer them employment at New-Stan. I find no evidence to support the General Counsel's contention that the employees of NDC were scattered to all parts of the country. On the contrary, the vast majority of NDC's former employees had been rehired by New-Stan.

d. *Whether the same jobs exist under the same working conditions*

The evidence adduced at the hearing was scant with respect to this matter. Neither the General Counsel nor the Charging Party came forth with any evidence to support any position to negate the conclusion that the same jobs exist under the same working conditions. Accordingly, I conclude that the same jobs do exist under the same working conditions.

e. *Whether Respondent employs the same supervisors*

The undisputed testimony established that, at the commencement of the production at New-Stan on June 23, four supervisors of NDC were immediately recalled by New-Stan and continued to operate as supervisors for New-Stan as formerly performed for NDC. However, several weeks later two supervisors formerly employed by Standard were hired by New-Stan to complete their supervisory staff. Inasmuch as a majority of the supervisory staff employed by New-Stan had been former supervisors of NDC, and the two additional supervisors were not replacements for supervisors previously employed by NDC, but were added to the supervisory staff of New-Stan, I conclude that New-Stan meets this criteria.

[20] Likewise, all parties stipulated that Standard also is engaged in the same business operations.

f. Use of the same equipment, machinery, and methods of production

As set forth above in the facts, New-Stan purchased from NDC all of its equipment and machinery. However, additional machinery was purchased from Standard. With respect to the methods of production, New-Stan, as stipulated by all parties, is engaged in the same operations as that of NDC.

g. Whether New-Stan manufactures the same product or offers the same services as NDC

Again, it is clear from the record and from the stipulation of the parties that New-Stan is engaged in the business of dyeing fabric and other material, the same business previously performed by NDC.

It is apparent from the foregoing discussion that New-Stan satisfies all the criteria considered by the Board for determining whether New-Stan is a successor to NDC. Certainly, where the evidence is weak as, for example, in item d, no evidence was adduced to support any contention that New-Stan does not meet that particular test. Nevertheless, both the General Counsel and the Charging Party have submitted well-thought-out briefs to support their contentions which necessitate a detailed response.

The General Counsel contends that it is "unlawful for an employer to recognize a union at a time when that union represents only a minority of the employees or no employees at all, as in the instant case," citing *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp.]* v. *N.L.R.B.*, 366 U.S. 731 (1961), to support his argument. The argument would be of value had I concluded that New-Stan was not a successor of NDC. Thus, as an entire new entity, New-Stan would not be permitted under Court and Board rules to recognize any union prior to the hiring of any employees.

The Charging Party argues that the Board and Courts have ruled that a successor employer's duty to bargain does not commence until it is *perfectly clear* that it intends to hire a majority of its work force from the ranks of the predecessor's employees, citing, in addition to *Burns. supra; Bellingham Frozen Foods, a Division of San Juan Packers*, 237 NLRB 1450 (1978), to support its argument. The critical point, therefore, is whether or not New-Stan made it "perfectly clear" that it was hiring all of the old unit employees. The Charging Party and the General Counsel contend that it was not until subsequent to the collective-bargaining agreement executed on June 9 between Local 239A and New-Stan that employees were hired.

They argue that New-Stan, as evidenced by its discussions with representatives of both Standard and NDC employees, was simply shopping around to find the union which would best accommodate it, and, having concluded that Local 239A presented a contract more favorable to New-Stan than that of the Charging Party, it therefore chose Local 239A to represent its soon-to-be-hired employees. Although there is evidence in the record that the representatives of ACTWU bargained extensively with those principals of New-Stan who formerly were supervisors at Standard, but reached no agreement, I am convinced that Bill and Barone were simply stalling for time without making any commitment to ACTWU. While this was happening in Paterson, New-Stan's representative at Newburgh, namely, Greg, had indicated to the employees of NDC that they would be rehired by the new company when operations commenced. For support of my conclusion, I note that the evidence established that Barone refused to hand out applications to Standard's employees in New Jersey, but insisted that any employee desiring employment must trek to Newburgh, a distance of 44 miles, to make an application for employment. On the contrary, the former employees of NDC were not even required to make an application for employment at New-Stan. Greg simply contacted them by telephone, or in person, and the employees returned to the Newburgh plant to continue working as before. The record is void of any evidence that any employee of Standard ever actually applied for employment at New-Stan in Newburgh. The record is void of any evidence that any employees of Standard are actually and presently employed by New-Stan. Although the record is bereft of any hard evidence to reveal the true purpose that the principals of New-Stan had in dealing with representatives of the Charging Party, in the business world, it is common practice that in a shutdown of a plant, employers tend to wait as long as possible before notifying employees or their representatives of their plans. This is so because the employer desires to have its employees working for it until the last possible moment of operations. Otherwise, should an employer inform its employees of a proposed shutdown in some distant future time, employees would "leave the sinking ship" and obtain employment elsewhere, thus leaving the employer with production and wrapup work to be done without any help.

Accordingly, I have concluded that New-Stan had every intention to hire as many former employees of NDC as it possibly could upon commencement of its production on June 23. The Board has held that the "pre-hire" nature of negotiations are not objectionable where a successorship is found and when the employees have already selected a bargaining representative at their previous employer. *General Electric Company*, 173 NLRB 511, 513 (1968).

Having concluded that New-Stan had every indication of hiring NDC's employees, under the doctrine enunciated by the Board in *General Electric*, I find that New-Stan had every right and, further, an obligation to bargain with Local 239A. I further conclude that the General Counsel's argument with respect to the prehire issue is inapposite in this case.

To further support his position, the General Counsel notes that there was 2-month hiatus between the shutdown of NDC, and the opening of New-Stan, contending that this hiatus constitutes a clear break between the old and new operations which is a determining factor in establishing that New-Stan is not a successor employer, citing *Norton Precision, Inc., A Subsidiary of Norton Foundries Company*, 199 NLRB 1003 (1972), and *Stewart Granite Enterprises*, 255 NLRB 569 (1981). However, in

Pacific Aggregates, Inc., the Board affirmed the findings of the Administrative Law Judge who stated, "The fact that there may have been a lapse of about 2 months between the operation by [predecessor] and the resumption by [successor] does not negate that conclusion [the conclusion that the new company was a succcessor of the old company]." *Pacific Aggregates, Inc., et al.*, 231 NLRB 214, 219 (1977). Thus, it would appear that, depending on the facts of each individual case, a 2-month hiatus, as appears to have been present in the instant case, is not a determining factor in weighing all the test of successorship.

The Charging Party further contends that New-Stan violated the Act by granting recognition to, and entering into a collective-bargaining agreement with, Local 239A at a time when a valid question concerning representation existed, citing *Hudson Berlind Corporation*, 203 NLRB 421 (1973). I find this agrument without merit. Having found that New-Stan had intended to, and did in fact, hire all the former employees of NDC, and did not hire any employees of Standard, I cannot agree with the Charging Party that there were conflicting claims of two unions representing potentinal employees of New-Stan.

Two other factors weighed heavily in my determination that New-Stan was not a merger of Standard and NDC. The undisputed testimony, confirmed by documentary evidence, establishes that the sole stockholder of NDC was Frederick Massimi, Sr., who owned 100 percent of the stock. He was not involved in the formation of New-Stan, other than guaranteeing a loan to his two sons, Fred Jr. and Greg, which was used for the purchase of New-Stan stock. The record further establishes that five individuals, formerly officers of Standard, owned a total of 46 percent of Standard's stock. Thus, 54 percent of the shareholders of Standard did not participate in the formation of New-Stan. Accordingly, I have concluded that the ownership of New-Stan is composed of seven individuals, none of whom, individually or collectively, were majority stockholders of either Standard or NDC.

Additionally, the record established that New-Stan was incorporated in May 1980 and commenced production on June 23. Although NDC was no longer in operation, the record established that Standard continued to operate as a viable entity in Paterson, New Jersey, until sometime in August. Thus, for approximately 2 months in the summer of 1980, both Standard and New-Stan were engaged in similar economic activity.

Thus, in analyzing the entire record and cases cited by all parties, on balance, I agree with Respondents New-Stan and Local 239A that actions taken by them with respect to recognition and entering into a collective-bargaining agreement were valid under Board and court law, and therefore, I recommend that this portion of the complaint be dismissed.

E. *The Surveillance, Interrogation, and Discharge of Jack Mulligan*

Mulligan testified in clear detail as to the events of July 1 and 2. That portion of his testimony which could be verified was verified by Paul Ventura. New-Stan offered no evidence, either through Fred Jr. or Haskins to dispute the testimony of Mulligan with respect to conversations among Mulligan, Kassel, Fred Jr., and Haskins in Fred Jr.'s office on July 2. Accordingly, I credit the testimony of both Mulligan and Paul as to the events of July 1 and 2.

New-Stan, through Greg, did dispute the allegation of surveillance by Greg on July 2. New-Stan contends that Greg's action during lunchtime, with respect to following Mulligan and Kassel by automobile, a mere coincidence as he was using his car to go to lunch, and because of traffic conditions he was driving very slowly.

The facts relating to the incidents of July 1 and 2 involving Fred Jr. clearly established that New-Stan violated the Act through surveillance, interrogation, and discharge of Mulligan. Were the incidents involving Greg standing by themselves, I might have accepted New-Stan's argument that Greg's action was merely coincidental and therefore no violation with respect to him exists. However, coupled with the entire scenario involving Fred Jr. on July 1 and 2, I have concluded that Greg's action of July 2 was not a mere coincidence, but part of a pattern initiated by Fred Jr. the previous day in closely surveilling the actions of Mulligan and Kassel. New-Stan made no effort to disguise the interrogation conducted by Fred Jr., both outside the gate in the presence of the representatives of the Charging Party on July 1 and in Fred's office in the presence of Haskins on July 2. New-Stan may argue that by this time recognition had been accorded to Local 239A, and, therefore, there was no fear that the Charging Party would be successful in organizing the plant. This argument appears to have merit. However, although I cannot ascertain the rationale for the actions taken by Fred Jr. and Greg, these individuals impressed me as not being particularly sophisticated in labor laws, as evidenced by Fred's statement to Mulligan that it was against the law to sign two union authorization cards. If New-Stan was not certain that its recognition of Local 239A was legally sound, one can conclude that it was attempting to discourage any organizational activity on the part of the Charging Party at the end of June and beginning of July.

New-Stan contends that it is illogical to have discharged Mulligan and not Kassel as Kassel and Mulligan were engaged in the same union activity at the same time. However, the record establishes that in the interrogation of Kassel and Mulligan, Kassel acknowledged that he had signed a union authorization card for Local 239A. No evidence was adduced that he signed a union authorization card for the Charging Party. On the contrary, Mulligan admits having signed a card for the Charging Party and denies having signed a card for Local 239A. Thus, there is a vast difference between the union-related activities of Mulligan and Kassel. Furthermore, I do not credit Greg's testimony that he was unaware that Mulligan had accused New-Stan of an unfair labor practice in discharging and failing to rehire him. Greg stated that he was unaware that Mulligan had been discharged, but had been laid off for lack of work. He lamely testified that, inasmuch as Mulligan had failed to keep in touch with New-Stan following his layoff, Greg concluded that he was not interested in a recall, and therefore he was not recalled. I do not find any merit in this defense. New-Stan failed to support its position by submission of evidence that this was its practice or these were rules and regulations. Coupled with other factors, New-Stan's failure to recall Mulligan allegedly because he failed to "keep in touch" does not impress me one bit.[21] Another factor which I consider important is the timing of the alleged "layoffs" of Mulligan and Kassel. They had been interrogated by Fred Jr. on the morning of July 2. They left for lunch and were observed by Greg talking to the two agents for the Charging Party. Upon their return to New-Stan's facility, they were denied entrance to the plant by an employee guard, who is not even a supervisor of New-Stan. This is not the normal procedure for laying off employees. Normally, an employee is given some notice of a layoff, certainly in an amicable setting, and usually at the end of a workday or workweek. It is very unusual to lay off employees during their lunchtime upon their return to their work station, without any explanation to justify this extraordinary procedure.

Accordingly, considering all the relevant facts of this subject matter, I have concluded that in addition to finding a violation of the Act by surveillance by Fred Jr. and Greg, and an 8(a)(1) independent violation of interrogation by Fred Jr., I further conclude that Mulligan was discharged on July 2 because of his activities on behalf of the Charging Party in violation of Section 8(a)(3) and (1) of the Act.

F. *Discharge of James Lewis*

The facts relating to Lewis' work record at New-Stan and his discharge are well documented, *supra*, in the factual portion of this report. At first blush, it may appear that inasmuch as Lewis, an employee of less than a week's duration, absented himself from New-Stan's plant without permission or without notifying anyone of the reasons for his absenteeism, his discharge would be warranted. However, Lewis credibly testified without contradiction that, in his previous employment at NDC, he had absented himself on several occasions from the plant, with neither permission nor knowledge of his employer, and did not notify the employer of his absenteeism until after he returned. No disciplinary action was taken against him, and therefore, he had every reason to believe, as New-Stan is the successor of NDC, that the employer had not changed its policy with respect to absenteeism and that notification of a proposed absence from the plant on a workday was not necessary.

Although New-Stan may argue that the activity of Lewis with respect to his participation in organizational activity for the Charging Party was minimal, the record is clear that Lewis did accept union authorization cards from agents of the Charging Party and did, in fact, hand out cards in the plant on Monday, June 30. Lewis testified that he observed Bobby Turner, a supervisor of New-Stan, watching him while he was engaged in some union activities. Turner was not called upon to deny this testimony. Since Turner is an acknowledged supervisor of New-Stan, I therefore conclude that the failure to refute the testimony of Lewis can only signify that Turner was aware of his union activities and did, in fact, report it to higher authority. This conclusion is buttressed by New-Stan's failure to refute or deny the testimony of Mulligan, *supra*, in which Mulligan testified that Haskins stated in the presence of Fred Jr. on July 2 that Lewis was laid off because he distributed the "blue union cards." Although Haskins, as president of Local 239A, is not a supervisor nor an agent of New-Stan, the statement by him in the presence of Fred Jr., a principal of New-Stan, must be imputed to New-Stan as Fred Jr. failed to disassociate himself or New-Stan from the remarks of Haskins. In essence, by Fred Jr.'s failure to deny that Lewis' discharge was effectuated as a result of his distribution of cards for the Charging Party, one can conclude that the facts as stated by Haskins were accurate.

The Federal Rules of Evidence, Section 801(d)(2)(B), permits the admission of evidence against a party, where the party has manifested its adoption or belief in its truth. It is clear that silence can be relied on as such a manifestation. The Advisory Committee's notes concerning this rule sums up the rationale as follows: "When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if true. The decision in each case calls for an evaluation of probable human behavior."[22]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of New-Stan set forth in section III, above, occurring in connection with the operation of New-Stan described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that New-Stan has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that New-Stan discharged Jack Mulligan and James Lewis because of their activities on behalf of the Charging Party, and not having thereafter offered reinstatement to them, I recommend that New-Stan offer them immediate and full reinstatement to their former positions, or, if such positions have been abolished or changed in New-Stan's operations, then to any substantially similar positions without prejudice to their seniority or other rights and privileges, and that New-Stan makes them whole for any loss of pay they may have suffered by reason of New-Stan's discriminatory terminations of them, by payment to each of them of a sum equal to that which they would have normally received

[21] Further, I credit Mulligan who testified that later that week he telephoned New-Stan, inquiring when he would be recalled to work.

[22] Fed. R. Evid. Sec. 801(d)(2)(B), Advisory Committee's Notes 1975. See also *United States* v. *Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976); *Hellenic Lines Ltd.* v. *Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1965).

as wages from July 2, 1980, the date of their terminations, until New-Stan offers them reinstatement, less any net earnings for the interim period. Backpay is to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

CONCLUSIONS OF LAW

1. New-Stan Dyeing and Finishing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, and Local 239A, United Textile Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Frederick Massimi, Jr., and Gregory Massimi are agents of New-Stan Dyeing and Finishing Co., Inc., acting on its behalf.

4. By discharging Jack Mulligan and James Lewis, its employees, because of their activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, New-Stan Dyeing and Finishing Co., Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

5. By interrogating employees about their union activities and by engaging in surveillance of their employees, New-Stan Dyeing and Finishing Co., Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Neither Respondent New-Stan Dyeing and Finishing Co., Inc., nor Respondent Local 239A, United Textile Workers of America, AFL-CIO, has engaged in any other unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Respondent, New-Stan Dyeing and Finishing Co., Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating and engaging in surveillance of employees engaged in protected concerted and union activities.

(b) Discouraging membership in Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Jack Mulligan and James Lewis immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make Jack Mulligan and James Lewis whole for any loss of pay suffered by them by reason of their discriminatory terminations in the manner set forth in the section hereinabove entitled "The Remedy."

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll and other records containing information concerning backpay obligations under this recommended Order.

(d) Post at its Newburgh facility located in Newburgh, New York, copies of the attached notice marked "Appendix."[24] Copies of said notice on forms provided by the Regional Director for Region 2 shall, after being duly signed by an authorized representative of New-Stan Dyeing and Finishing Co., Inc., to be posted by New-Stan Dyeing and Finishing Co., Inc., immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by New-Stan Dyeing and Finishing Co., Inc., to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps New-Stan Dyeing and Finishing Co., Inc., has taken to comply herewith.

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[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."